COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Complaint of WorldCom Technologies, Inc. Against New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts	)	D.T.E. 97-116

Complaint of Global NAPs, Inc. Against New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts	)	D.T.E. 99-39

REPLY BRIEF OF VERIZON MASSACHUSETTS ON REMAND

Bruce P. Beausejour
Vice President and General Counsel
Verizon New England Inc.
185 Franklin Street, 13th Floor
Boston, Massachusetts 02110-1585

Robert N. Werlin
Keegan, Werlin & Pabian, LLP
21 Custom House Street
Boston, Massachusetts 02110

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In accordance with the Hearing Officer's Memorandum of October 24, 2002, Verizon New England Inc. d/b/a Verizon Massachusetts ("Verizon MA") respectfully submits this reply brief on remand.

I. INTRODUCTION AND SUMMARY

Pursuant to the District Court's Order, the Department is "obligat[ed]" to conduct "proceedings or deliberations," in which it interprets the language of the agreements at issue in light of "Massachusetts law and other equitable and legal principles."[1] As the District Court and Magistrate Judge made clear, these proceedings are to include a substantive assessment of the language of the agreements — after which, "the [Department] is not required to reach the same

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1 Hearing Officer Memorandum, D.T.E. 97-116, at 3 (Nov. 7, 2002) ("Hearing Officer Mem."); Memorandum Order on Magistrate Judge's Report and Recommendation on Defendants' Motions for Summary Judgment, *Global NAPs, Inc. v. New England Tel. & Tel. Co. d/b/a Verizon-Massachusetts*, Nos. 00-10407-RCL & 00-11513-RCL, at 3 (D. Mass. Aug. 27, 2002) ("District Court Order"); Findings and Recommendations, *Global NAPs, Inc.*, Nos. 00-10407-RCL & 00-11513-RCL, at 26 (D. Mass. July 5, 2002) ("F&R").

result it reached" in its October 1998 Order, but may instead conclude that these agreements do not require reciprocal compensation for Internet-bound traffic.[2] As explained in Verizon MA's Initial Brief, under Massachusetts contract law, the plain language of these agreements unambiguously excludes Internet-bound traffic from the scope of the reciprocal-compensation obligation, a conclusion that is strongly supported by the FCC's resolution of a nearly identical issue in *Starpower*.[3]

The arguments advanced by WorldCom, GNAPs, and other CLECs in an effort to avoid that conclusion are uniformly without merit. *First*, CLECs' attempts to avoid any substantive review of the agreement language fly in the face of the District Court's remand order. The order establishes that the Department is *not* bound by the result it reached in the October 1998 Order, and that the Court expected the Department to undertake "proceedings or deliberations not inconsistent with the [Court's] rulings." District Court Order at 3. Nor is conducting a substantive review of the terms of the agreements at issue somehow precluded under state law. The District Court never took issue with the Department's decision to review its October 1998 Order; instead, it held (mistakenly, in Verizon MA's view) that the Department did not base that review on the terms of the agreements. By complying with a binding order of a federal district court while seeking appellate review, the Department is neither undermining the First Circuit's jurisdiction nor evidencing any conceivable bias or even the appearance thereof. In such circumstances, agencies normally conduct proceedings on remand even while they seek further review of a court's order.

2 F&R at 26 (citing Order, D.T.E. 97-116 (Oct. 21, 1998) ("October 1998 Order")).

3 *Starpower Communications, LLC v. Verizon South Inc.*, 17 FCC Rcd 6873 (2002) ("*Starpower*"), *petition for review pending*, *Starpower Communications, LLC v. FCC*, No. 02-1131 (D.C. Cir.).

Second, the CLECs' reliance on the FCC's interpretation of Verizon South's interconnection agreements with Cox and Starpower (the "Verizon South agreements") is misplaced. Contrary to the CLECs' claims, the two Verizon South agreements differ significantly from the agreements at issue here. The table attached to WorldCom's Initial Brief demonstrates this clearly: the definition of local traffic in the Verizon South agreements contains no reference to where that traffic originates or terminates, while the definition of local traffic in the agreements at issue here, like the two agreements between Verizon Virginia and Starpower (the "Starpower Agreements"), speaks "in terms of 'origination' and 'termination' of traffic" and, therefore, "closely resembles the [FCC's] then-existing rule regarding the types of traffic subject to reciprocal compensation under section 251(b) of the Act."[4] In contrast, as shown in the table attached to Verizon MA's Initial Brief, the relevant provisions of the agreements at issue here are substantively indistinguishable from the provisions of the Starpower agreements that the FCC found unambiguously track and adopt federal law, which does not require reciprocal compensation for Internet-bound traffic (Verizon MA Initial Brief Attach. 1). Because the FCC found that such language demonstrates an "unambiguous[] agree[ment] *not* to treat ISP-bound traffic as 'Local Traffic' for reciprocal compensation purposes," it rejected claims — identical to those raised here — that the Starpower agreements, which contain substantially identical language to the agreements at issue here, should nonetheless be read to require payment of reciprocal compensation for such traffic. *Starpower* ¶¶ 33-38. In any event, the FCC has stated that its orders with respect to the Verizon South agreements are not final, and

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[4] *Cox Virginia Telcom, Inc. v. Verizon South Inc.*, 17 FCC Rcd 8540, 8550, ¶ 25 (2002) ("*Cox*"); *Starpower* ¶ 12.

do "not establish that Verizon South has a duty to pay reciprocal compensation . . . for the delivery of Internet-bound traffic."[5]

Third, there is no reason for the Department to permit discovery or to hold an evidentiary hearing before reaching its decision here. Because the agreements are unambiguous, such evidence is irrelevant to their proper interpretation under Massachusetts law. *See, e.g.*, *Coll v. PB Diagnostic Sys.*, 50 F.3d 1115, 1122 (1st Cir. 1995) (applying Massachusetts law). Even if the agreements were ambiguous, the Department issued its October 1998 Order solely on the briefs and argument of the parties, and should take the same approach here.

II. PURSUANT TO THE DISTRICT COURT'S ORDER, THE DEPARTMENT MUST INTERPRET THE INTERCONNECTION AGREEMENTS

Several of the CLECs argue that the Department should not engage in a substantive review of the terms of the interconnection agreements at issue (WorldCom Initial Brief at 10-14; GNAPs Initial Brief at 4-12; XO Initial Brief at 3-4; RNK Initial Brief at 5-6). Instead, they contend that the District Court's order remanding this matter leaves the Department with only the ministerial task of confirming that the October 1998 Order is in effect and requires Verizon MA to pay reciprocal compensation for Internet-bound traffic. WorldCom also contends that, by holding these proceedings while it seeks appellate review of the District Court's Order, the Department both interferes with the First Circuit's jurisdiction and cannot act as an impartial arbitrator here (WorldCom Initial Brief at 12-13; *see also* XO Initial Brief at 4 (arguing that these proceedings interfere with the First Circuit's jurisdiction)). Each of these attempts to avoid substantive review, under Massachusetts contract law, of the terms of these agreements lacks merit.

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[5] FCC Motion to Dismiss, *Verizon South v. FCC*, No. 02-1201, at 6 (D.C. Cir. filed Aug. 12, 2002) ("FCC Motion to Dismiss, No. 02-1201"); *see* FCC Motion to Dismiss, *Verizon South v. FCC*, No. 02-1177, at 7 (D.C. Cir. filed Aug. 15, 2002) ("FCC Motion to Dismiss, No. 02-1177").

A. The District Court's Remand Order Requires the Department To Conduct a Substantive Review of the Agreements

The District Court remanded this matter to the Department so that it could correct the infirmity that the Magistrate Judge and the District Court believed existed in the Department's May 1999 decision and later orders: namely, that they allegedly did not consider "whether, pursuant to Massachusetts law and other equitable and legal principles, the parties contracted in their interconnection agreements for reciprocal compensation for calls bound for ISPs." F&R at 27; *see* District Court Order at 2.

This was the District Court's sole ruling. *See* District Court Order at 3. Neither the Magistrate Judge nor the District Court reached the question whether the Department had correctly interpreted the agreements in its October 1998 Order. *See* F&R at 27 n.21 ("[T]he District Court would exceed its proper jurisdictional authority if it were to declare that calls to ISPs are subject to reciprocal compensation."). Indeed, "the Court [took] no position" on the question whether "the contractual language in the parties interconnection agreements only implicates federal law as a source of reciprocal compensation [obligations]," holding instead that "the [Department] must set forth a clear analysis of the issue based upon all relevant language in the interconnection agreements." *Id.* at 26 n.19. For these reasons, the Magistrate Judge expressly recognized, in a portion of the Findings and Recommendations that the District Court "expressly adopt[ed]," that, on remand, "*the [Department] is not required to reach the same result it reached*" in the October 1998 Order, where it found that Verizon MA was required to pay reciprocal compensation for Internet-bound traffic. *Id.* at 26 (emphasis added); *see* District Court Order at 2. That statement would be utterly nonsensical if the Court anticipated that the Department would not undertake substantive review of the terms of the agreements on remand.

Nevertheless, both WorldCom and GNAPs read the Court's statement that, on remand, "the DTE is not required to reach the same result it reached" in the October 1998 Order, to mean that the Court recognized that the Department might conclude that it had grounds to re-open the October 1998 Order under state law (WorldCom Initial Brief at 13-14; GNAPs Initial Brief at 7). This reading of the Magistrate Judge's Findings and Recommendations is untenable. The Magistrate Judge recommended that the District Court issue an injunction, which WorldCom and GNAPs had requested, that would have required "the DTE to undertake an analysis of the interconnection agreements" themselves, and would have "proscribe[d] the DTE from enforcing the [May 1999 and subsequent] Order[s] until such time as that analysis is complete." F&R at 24-25, 30. Thus, the Magistrate Judge clearly contemplated that the Department would conduct substantive proceedings on remand, but that, at the conclusion of those proceedings, the Department could again determine that the agreements at issue do not require payment of reciprocal compensation.

The District Court did not issue the injunctive relief that WorldCom and GNAPs had requested only because they "ha[d] not made the requisite showing of irreparable harm," *not* because the Court took issue with the requirement that the Department conduct further proceedings in this matter. District Court Order at 3 ("The record here does not establish any such harm."). In fact, the District Court required the Department to hold "proceedings or deliberations" consistent with "those parts of the Findings and Recommendations" that the Court adopted. *Id.* Thus, the District Court did not disturb the Magistrate Judge's conclusion that the Department, on remand, should determine whether the agreements, in light of state law and equitable considerations, require payment of reciprocal compensation for Internet-bound traffic. Moreover, the District Court provided the Department with greater discretion on remand than the

Magistrate Judge would have allowed, by rejecting the recommendation that the Department be "preclude[d]" from enforcing its orders holding that the agreements do *not* require such compensation until the remand proceedings are completed.

WorldCom and GNAPs also focus on the Magistrate Judge's statement that "the DTE properly considered th[e] question" — "whether, pursuant to Massachusetts law and other equitable and legal principles, the parties contracted in their interconnection agreements for reciprocal compensation for calls bound for ISPs" — "in the [October 1998] Order." F&R at 27; *see* WorldCom Initial Brief at 10-11; GNAPs Initial Brief at 2, 6-7, 25-26, 28. But the Magistrate Judge was not, as the CLECs claim, "specifically *affirm[ing]* the contractual analysis undertaken by the Department in its October 1998 Order" (WorldCom Initial Brief at 11; *see* GNAPs Initial Brief at 7; *see also* RNK Initial Brief at 5). The Magistrate Judge, like the District Court, found only that the Department had asked the correct question in its October 1998 Order; as noted above, it expressly refused to rule on whether the Department reached the right answer in that order. *See* F&R at 26 n.19, 27 n.21. Indeed, if the Magistrate Judge had actually mandated adherence to the result the Department reached in its October 1998 Order, its statement that the Department, on remand, could reach a different result would make no sense.

B. The Department Is Not Obligated To Adhere to Its October 1998 Order Under State Law

In its May 1999 Order, the Department determined that it should review the decision it reached in the October 1998 Order because it was based on an erroneous interpretation of federal law. *See* Order, D.T.E. 97-116-C, at 24 (May 19, 1999) ("May 1999 Order"). Relying on its precedent, the Department found that the "real question" was not whether that legal error "*requires* us . . . to modify our October decision, *but* whether we should cast about for some reason, any reason to sustain that questionable result." *Id.* at 38 & n.42.[6] Although the Court rejected the Department's conclusion that the October 1998 Order "stood *squarely, expressly, and exclusively*" on its interpretation of the agreement in light of federal law, May 1999 Order at 25, it found that the October 1998 Order rested, at least in part, on the Department's understanding "of the state of federal telecommunications law on reciprocal compensation for ISP-bound calls at the time of contract formation." F&R at 27 n.20. Neither the District Court nor the Magistrate Judge took issue with the Department's decision to review that order in light of subsequent FCC orders making clear the Department's legal error.

In fact, it is still the case that the Department's October 1998 Order was based on a misunderstanding of federal law. As the FCC explained in its *ISP Remand Order*,[7] Internet-bound traffic involves a single call "that travel[s] to points — both interstate and intrastate — beyond the local exchange." *ISP Remand Order* ¶ 37. Indeed, the FCC expressly rejected WorldCom's claim — which was based on the same understanding of federal law as the October 1998 Order — that Internet-bound traffic involves two separate components, one a "basic telecommunications link[]" that is used to make a local call, the other an "information service[]" provided by the ISP. *Id.* ¶ 44 n.82.[8] Although the D.C. Circuit rejected the FCC's conclusion

6 Even the Commissioners dissenting from the May 1999 Order recognized that the October 1998 Order rested solely on the "two-call" theory analysis. *See* Concurring and Dissenting Opinion at 1-3 ("On February 26, 1999, the FCC determined that ISP-bound traffic was considered interstate based on a one-call analysis. *Internet Traffic Order* at ¶¶ 1-3. We agree with the majority that this decision removes the basis we used to support our conclusions in the October Order."). However, the dissenting Commissioners would have required that Verizon MA make payments "until such time as the Department determines whether *other* legitimate sources of support for this obligation exist." *Id.* at 3 (emphasis added).

7 Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*"), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

8 Accordingly, the Department misconstrued federal law in its October 1998 Order when it read the FCC's determination that ISPs need not contribute to universal service support mechanisms, because they provide a service "'distinguishable from'" telecommunications service, to mean that, for purposes of reciprocal-compensation payments between two local exchange carriers, a call to an ISP "is functionally two separate

that 47 U.S.C. § 251(g) operates to exempt such traffic from the reciprocal-compensation requirement in § 251(b)(5), the D.C. Circuit "ma[d]e no further determinations." *WorldCom*, 288 F.3d at 434. Thus, the court did not "decide the scope of the 'telecommunications' covered by § 251(b)(5)," nor did it review, much less reject, the FCC's still-binding conclusion that Internet-bound traffic is a type of interexchange, interstate traffic. *Id.* Accordingly, the same reasons that led the Department, in its May 1999 Order, to find cause to reconsider its October 1998 Order exist today.

For these reasons, the CLECs' suggestions that the Department must again determine, as an initial matter, whether to re-open its October 1998 Order are misplaced (*see, e.g.*, GNAPs Initial Brief at 7-11; WorldCom Initial Brief at 13-14; XO Initial Brief at 6). The Department has already concluded that the conditions, under state law, for re-opening its prior decision have been met here, and nothing in the District Court's order or the Magistrate Judge's Findings and Recommendations is to the contrary. Even if the Department were required to reconsider this question, it must do so in light of the District Court's order remanding this matter "for proceedings or deliberations." District Court Order at 3. As the Supreme Court has made clear, when a court remands a matter to an agency because of an error in the agency's decision, normal procedural restraints on agency authority do not apply. *See United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965).

C. The Department Must Conduct These Proceedings While Its Appeal Is Pending

The Hearing Examiner correctly found that, unless a stay of the District Court's order is granted, the Department is under "an ongoing obligation to address the District Court's remand."

services," one of which is "a local call to the ISP." October 1998 Order at 11-12 (quoting Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9180, ¶ 789 (1997)).

Hearing Officer Mem. at 3. Indeed, it is hornbook law that "[t]he taking of an appeal does not by itself suspend the operation or execution of a district-court judgment or order during the pendency of the appeal." 16A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3954, at 295 (3d ed. 1999). WorldCom and XO, therefore, are incorrect in contending that the Department is somehow relieved of its obligation to conduct the remand proceedings that the District Court required while it seeks appellate review of the District Court's order (WorldCom Initial Brief at 12-13; XO Initial Brief at 4).

In fact, in a recent case, the FCC took precisely the course of action that the Department is taking here. The D.C. Circuit found that the FCC had violated the Bankruptcy Code when it cancelled licenses for wireless spectrum held by a bankrupt licensee, and "remand[ed]" the matter to the FCC "for proceedings not inconsistent with this opinion." *NextWave Pers. Communications, Inc. v. FCC*, 254 F.3d 130, 133, 156 (D.C. Cir. 2001). The FCC then sought review of the D.C. Circuit's decision in the Supreme Court, and the Court granted its petition for a writ of certiorari. *See FCC v. NextWave Pers. Communications, Inc.*, 122 S. Ct. 1202 (2002) (No. 01-653). At the same time, however, because there was no stay of the federal court decision, the FCC conducted the proceedings on remand required by that order, despite the fact that it was seeking further review of the court's order, and contending that it was erroneous.[9]

As this example shows, and contrary to WorldCom's claim, the Department is not interfering with the First Circuit's jurisdiction by conducting the proceedings the District Court

9 *See, e.g.*, Public Notice, *Wireless Telecommunications Bureau Announces the Return to Active Status of Licenses to NextWave Personal Communications Inc. and NextWave Power Partners Inc., Subject to the Outcome of Ongoing Litigation*, 16 FCC Rcd 15970 (2001); Public Notice, *Commission Seeks Comment on Disposition of Down Payments and Pending Applications for Licenses Won During Auction No. 35 for Spectrum Formerly Licensed to NextWave Personal Communications Inc., NextWave Power Partners, Inc. and Urban Comm–North Carolina, Inc.*, WT Docket No. 02-276, FCC 02-248, at 1-2 & n.2 (Sept. 12, 2002).

required.[10] Indeed, if the Department were to follow WorldCom's suggestion, it would effectively grant itself the very stay that it sought from the District Court on November 12, 2002. *See International Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 923 (D.C. Cir. 1984) (agency may not, "in effect, implement[] [a] stay on [its] own"). Nor is there any merit to XO's claim that the Department must await the First Circuit's decision to ensure that it applies the correct law during its remand proceedings (XO Initial Brief at 4). Verizon MA agrees that such a rationale may support the issuance of stay of the District Court's order; however, unless and until the District Court's order is stayed, the Department remains under a binding obligation to comply with that order.

Finally, WorldCom asserts that, in light of its litigation position before the District Court and in the First Circuit, the Department cannot act as an impartial adjudicator in these proceedings (WorldCom Initial Brief at 12-13). Yet the "speculative possibility" that the Department could not set aside its disagreement with the District Court's conclusions and comply with that Court's order "fails to overcome the strong presumption of regularity" that attaches to administrative actions. *Hercules, Inc. v. EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978); *see United States Postal Serv. v. Gregory*, 534 U.S. 1, 9 (2001); *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926) ("in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties"). Nor is there any appearance of bias here. The Department long ago invited CLECs to argue "that Massachusetts contract law or other legal or equitable considerations give rise to [a] mutual obligation . . . to

[10] None of the seven cases that WorldCom cites in support of this claim involved the situation present here, where an agency is seeking review of a court order remanding a matter for further proceedings. For example, in *BellSouth v. FCC*, 17 F.3d 1487 (D.C. Cir. 1994), a private party both appealed from an FCC decision and filed a petition for reconsideration with the agency, and D.C. Circuit precedent requires a private party challenging an agency decision to select a single forum in which to proceed, *see id.* at 1489-90. In the other six cases WorldCom cites (at 12), the agency, acting on its own authority and not pursuant to a court order, attempted to re-open a proceeding that was subject to review by a court.

pay reciprocal compensation for ISP-bound traffic,"[11] which is precisely the analysis that the District Court ordered the Department to undertake on remand. The Department thus had agreed to consider revisiting these issues, even without a federal court order requiring it to do so.

III. UNDER STATE CONTRACT LAW, THE UNAMBIGUOUS TERMS OF THE INTERCONNECTION AGREEMENTS DO NOT REQUIRE VERIZON MA TO PAY RECIPROCAL COMPENSATION FOR INTERNET-BOUND TRAFFIC

As Verizon MA demonstrated in its Initial Brief, the interconnection agreements at issue here unambiguously exclude Internet-bound traffic from the requirement to pay reciprocal compensation (Verizon MA Initial Brief at 13-24). Under Massachusetts law, "where [a] contract is unambiguous, it is to be enforced according to its terms." *Coll*, 50 F.3d at 1122 (internal quotation marks omitted). Moreover, the terms of a contract are to be construed "as a whole, . . . consistent with its language, background, and purpose." *USM Corp. v. Arthur D. Little Sys.*, 546 N.E.2d 888, 893 (Mass. App. Ct. 1989). The agreements at issue were adopted contemporaneously with the FCC's initial rulemaking proceeding implementing the 1996 Act, in which the FCC, among other things, defined carriers' reciprocal-compensation obligations under 47 U.S.C. § 251(b)(5). Unsurprisingly, the parties' agreements expressly follow the FCC's rules implementing that section of the Act.[12]

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[11] May 1999 Order at 27.

[12] As Verizon MA has explained, if two carriers negotiating an interconnection agreement are unable to agree on terms and conditions, the state commission will be called upon to resolve the dispute in accordance with the requirements of federal law, "including the regulations prescribed by the [FCC]." 47 U.S.C. § 252(c)(1); *see* Verizon MA Initial Brief at 17-18. This provides carriers with a significant incentive to agree to adopt the terms of federal law, as those terms will be imposed in any event if they cannot agree on which terms to adopt.

Not only do the agreements state generally that they fulfill the parties' obligations under the terms of the Act,[13] but also they explicitly link the parties' reciprocal-compensation obligations to the requirements of federal law:

- ? The title of the section containing the parties' reciprocal-compensation obligations is "Reciprocal Compensation Arrangements — *Section 251(b)(5)*."[14]

- ? "Reciprocal Compensation" is defined to mean "*As Described in the Act*," which in turn is defined to mean "as described in or *required by the Act* and as *from time to time interpreted in the duly authorized rules and regulations of the FCC or the Department*."[15]

Moreover, both the description of the parties' obligation to pay reciprocal compensation for local traffic and the definition of local traffic itself track the then-applicable FCC regulations implementing § 251(b)(5):

- ? "Reciprocal Compensation only applies to . . . *Local Traffic* . . . which . . . *originates* on [Verizon MA's] or [WorldCom's] network for *termination* on the other Party's network."[16]

- ? "'Local Traffic' means a call which is *originated* and *terminated* within a given LATA . . . as defined in DPU Tariff 10, Section 5."[17]

And the agreements further state that reciprocal compensation is not required for "Switched Exchange Access Service," which is defined to include, among other things, "Feature Group A

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13 *See* Verizon MA–WorldCom Agreement, Whereas Recital, at 1 & § 3.0 (stating that the parties entered the Agreement to "set forth . . . the terms and conditions under which the parties will interconnect their networks . . . as required by the Act" and that "the terms of this Agreement . . . will satisfy the obligation of [Verizon MA] to provide Interconnection under Section 251 of the Act"); Verizon MA–GNAPs Agreement, Whereas Recital, at 1 & § 3.0 (same); *see also* Verizon MA Initial Brief at 14.

14 Verizon MA–WorldCom Agreement, § 5.8 (emphasis added); *accord* Verizon MA–GNAPs Agreement, § 5.7.

15 Verizon MA–WorldCom Agreement, §§ 1.6, 1.53 (emphases added); *accord* Verizon MA–GNAPs Agreement, §§ 1.6, 1.54.

16 Verizon MA–WorldCom Agreement, § 5.8.1 (emphases added); *accord* Verizon MA–GNAPs Agreement, § 5.7.1; *see* Verizon MA Initial Brief at 15-16.

17 Verizon MA–WorldCom Agreement, § 1.38 (emphases added); *accord* Verizon MA–GNAPs Agreement, § 1.38; *see* Verizon MA Initial Brief at 15-16.

. . . and . . . similar Switched Exchange Access Services."[18] As Verizon MA has explained, the FCC has found that Internet-bound traffic is "quite similar" to Feature Group A service, which is an "*interstate* access service" where a "caller first dials a seven-digit number to reach the [long-distance carrier], and then dials a password and the called party's area code and number to complete the call." *ISP Remand Order* ¶ 61.

The plain language of these agreements compels the conclusion that Verizon MA agreed to pay reciprocal compensation where required by law, no more and no less. Indeed, when the FCC applied the same plain-meaning canon of interpretation that applies under Massachusetts law to two interconnection agreements that similarly "track[ed] the [FCC's] construction of section 251(b)(5)," it found that the parties had "unambiguously agreed *not* to treat ISP-bound traffic as 'Local Traffic' for reciprocal compensation purposes." *Starpower* ¶ 36; *see* Verizon MA Initial Brief at 19-22. The FCC explained that the "definitions of 'Local Traffic' closely resemble the [FCC's] preexisting descriptions of the kind of traffic subject to the reciprocal compensation mandate of section 251(b)(5) of the Act," which define local traffic as traffic that "originates and terminates within a local service area as defined by a state commission." *Starpower* ¶ 31. These "striking similarities," the FCC concluded, "reveal[ed] an intent to track the [FCC's] interpretation of the scope of section 251(b)(5)," so that "whatever the [FCC] determines is compensable under section 251(b)(5) will be what is compensable under the agreements." *Id.* Because the FCC "consistently has concluded that ISP-bound traffic does not fall within the scope of traffic compensable under section 251(b)(5)," these two agreements did not require payment of reciprocal compensation for such traffic. *Id.*; *see also* Verizon MA Initial Brief at 22-24. Finally, the FCC rejected Starpower's claims that other non-textual

[18] Verizon MA–WorldCom Agreement, § 1.60; *accord* Verizon MA–GNAPs Agreement, § 5.7.1; *see* Verizon MA Initial Brief at 16-17.

considerations — such as the various factors the FCC had enumerated in its *ISP Declaratory Ruling*[19] for use in construing ambiguous agreements — could trump the plain meaning of the agreement. *See Starpower* ¶¶ 33-38.

The FCC's interpretation of the Starpower agreements is entitled to deference and, in any event, is highly persuasive authority for the proposition that under Massachusetts law — which applies the same plain-meaning canon of interpretation that the FCC applied in *Starpower* — the agreements at issue impose the same reciprocal-compensation obligations as federal law. In fact, since the FCC released its *Starpower* order, no federal court has upheld a state commission decision interpreting an interconnection agreement to require payment of reciprocal compensation for Internet-bound traffic. Although the CLECs challenge this interpretation of the agreements on a number of grounds, their arguments are inconsistent with the plain terms of those agreements.

A. The FCC's Conclusion That Two Verizon South Interconnection Agreements Require Payment of Reciprocal Compensation for Internet-Bound Traffic Is Not Relevant Here

WorldCom and GNAPs claim that the agreements at issue here are not like the Starpower agreements, but instead "closely resemble" two Verizon South interconnection agreements that the FCC found to require payment of reciprocal compensation for Internet-bound traffic (WorldCom Initial Brief at 17-19; GNAPs Initial Brief at 20-22). The CLECs' reliance on the FCC's interpretation of the Verizon South agreements fails on the merits. The agreements at issue here differ significantly from the Verizon South agreements. For example, the Verizon South–Cox Agreement neither expressly refers to § 251(b)(5) in the title of the section setting

[19] Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689 (1999), *vacated*, *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (2000).

forth the parties' reciprocal-compensation obligations, nor states that reciprocal compensation is "As Described in the Act."[20] Moreover, in the Verizon South–Cox agreement, the definition of "local traffic" in the agreement makes no reference to where calls originate and terminate. *Cox* ¶ 5 (internal quotation marks omitted); *see* WorldCom Initial Brief Attach. 3. Instead, that agreement "defines 'Local Exchange Traffic' as 'any traffic that is defined by Local Calling Area,'" which, "in turn, means 'Extended Area Service (EAS) and Extended Local Service (ELS) calling area as defined in [Verizon South's] local tariff at the date of this agreement.'" *Cox* ¶ 5.

The FCC found this last fact to be of "particular" importance. According to the FCC, because the Verizon South–Cox "Agreement's definition of 'local exchange traffic' does not speak in terms of 'origination' and 'termination' of traffic," the "*Agreement does not track the language used by the [FCC] to implement section 251(b)(5) of the Act*." *Id.* ¶ 25 (emphasis added); *accord Starpower* ¶ 47. Indeed, it was the failure of the agreement to define local traffic by reference to its origination and termination points that led the FCC to find that the Verizon South agreement "differs significantly from the Starpower–Verizon Virginia agreements." *Starpower* ¶ 47. In contrast, the definition of local traffic in the agreements at issue here "*does* . . . speak in terms of 'origination' and 'termination' of traffic," and therefore these agreements do track the FCC's language and thus evidence the parties' agreement that "whatever the

20 The Verizon South–Cox agreement was similar to the Starpower–Verizon South Agreement. *See Cox* ¶ 23 n.73. WorldCom suggests that the "As Described in the Act" language "merely describe[s] *what reciprocal compensation is*," and not "*when reciprocal compensation will be paid*" (WorldCom Initial Brief at 22). Yet the definition of reciprocal compensation in the agreement, like the definition of local traffic, states that reciprocal compensation involves "payment arrangements that recover costs incurred for . . . [traffic] originating on one Party's network and terminating on the other Party's network." Verizon MA–WorldCom Agreement § 1.53. Thus, the definition describes both what reciprocal compensation is and when it will be paid; by further tying that definition to the "require[ments of] the Act," "as from time to time interpreted . . . [by] the FCC or the Department," the parties made clear that the definition incorporates the substantive requirements of federal law.

Commission determines is compensable under section 251(b)(5) will be what is compensable under the agreements." *Cox* ¶ 25 (emphasis added); *Starpower* ¶ 31.

WorldCom and GNAPs, however, contend that the reference to Verizon MA's tariff in the agreements' definition of local traffic means that, as the FCC found with respect to the Verizon South agreements, the agreements "define[] 'local traffic' by reference to a state tariff," such that "Verizon's treatment of [Internet-bound] calls under its state law tariffs defines its obligation to pay reciprocal compensation for calls to ISPs" (WorldCom Initial Brief at 18; *see* GNAPs Initial Brief at 22). WorldCom and GNAPs fail to inform the Department, however, that the definition of local traffic in the Starpower agreements also referenced Verizon's state tariffs. *See Starpower* ¶ 6 (first Starpower agreement defined local traffic as "traffic that is originated [on] . . . one . . . Party's network and terminate[d] . . . on th[e] other Party's network, within a given local calling area . . . as defined in [Verizon Virginia's] effective Customer tariffs") (internal quotation marks omitted); *id.* ¶ 12 (second Starpower agreement defined local traffic as "traffic that is originated [on] . . . one . . . Party's network and terminate[d] to . . . th[e] other Party's network within a given local calling area . . . as defined in Bell Atlantic's Tariffs") (internal quotation marks omitted). The FCC found that these definitions "reveal an intent to track the Commission's interpretation of the scope of section 251(b)(5)," even though they referenced Verizon's tariff in defining the local calling area. *Id.* ¶ 31. Accordingly, the fact that the agreements at issue here define the scope of the area in which traffic must originate and terminate to be local traffic by reference to a state tariff provides no support for WorldCom's or GNAPs' position.[21]

[21] GNAPs, but not WorldCom, also asserts that the definition of local traffic in the agreements at issue here requires reciprocal compensation for all traffic that is locally dialed — that is, where the calling party dials a 7- or 10-digit number (GNAPs Initial Brief at 14). But the agreement does not define local traffic by the dialing method; instead, such traffic must "originate[]" and "terminate[]" in a particular area, regardless of

WorldCom and GNAPs also point to the fact that the agreements at issue do not also define the parties' reciprocal-compensation obligations by reference to the "end-to-end jurisdictional nature of [a] call." *Starpower* ¶ 13; *see id.* ¶ 7. They claim that it was this lack of "end-to-end" language in the Verizon South agreements that led the FCC to find that those agreements required payment of reciprocal compensation for Internet-bound traffic (WorldCom Initial Brief at 19; GNAPs Initial Brief at 20-21). The FCC, however, did not ascribe such significance to that language. Instead, it repeatedly made clear that each of the two grounds on which it relied — that the definition of local traffic tracked its regulations and that the agreement incorporated the FCC's "end-to-end" jurisdictional analysis — was independent and sufficient in itself to support its conclusion that the Starpower agreements unambiguously did not require payment of reciprocal compensation for Internet-bound traffic. *See*, *e.g.*, *Starpower* ¶ 41 ("the agreements expressly reference[] and incorporate[] the Commission's historic[al] reliance on an 'end-to-end' analysis of traffic"; "*[m]oreover*, the language of the agreements manifests an intent to track the Commission's construction of the scope of compensable traffic under section 251(b)(5)") (emphasis added); *see also id.* ¶¶ 31, 36 (same). Moreover, as explained above, when the FCC concluded that the Verizon South agreements required payment of such compensation, it focused on the fact that the definition of local traffic in those agreements "does not speak in terms of 'origination' and 'termination' of traffic." *Cox* ¶ 25; *accord Starpower*

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how it is dialed. *See* Verizon MA–GNAPs Agreement § 1.38. That section goes on to state that certain calls that originate and terminate in that area — intraLATA calls that cannot be completed by dialing only 7- or 10-digits — are nonetheless "not considered local traffic," but that sentence does not change the fact that whether a call is local is based first on where it originates and terminates. *Id.* And the FCC has expressly found that the point where calls terminate for purposes of intercarrier compensation is not governed by the number of digits dialed. *See AT&T Corp. v. Bell Atlantic-Pennsylvania*, 14 FCC Rcd 556, 590, ¶ 80 (1998) (holding that AT&T service arrangement enabling a person in, for example, Boston to call a person in Atlanta by dialing a 7-digit number is still a long-distance call requiring AT&T to pay access charges), *recon. denied*, 15 FCC Rcd 7467 (2000); *ISP Remand Order* ¶ 61 & n.118 (Feature Group A service, which is locally dialed, is still a long-distance call requiring payment of access charges by long-distance carrier).

¶ 47. In fact, the *Cox* order never once mentions that the Verizon South–Cox agreement did not contain the "end-to-end" language found in the Starpower agreements.

The CLECs' reliance on the FCC's interpretation of the Verizon South agreements is also misplaced for a second, independent reason. The FCC itself has stated that its decisions with respect to the Verizon South agreements do "not establish that Verizon South has a duty to pay reciprocal compensation . . . for the delivery of Internet-bound traffic."[22] The FCC stated further that "Verizon South has experienced no legal consequences as a result of the FCC's orders."[23] Accordingly, the FCC found it "wholly speculative" that its orders with respect to these agreements might be relied upon in other proceedings to "subject [Verizon South] to . . . liability" to pay reciprocal compensation for Internet-bound traffic.[24] In light of the FCC's express statements — on which the D.C. Circuit relied on in finding that the FCC's orders are not final because they do not currently "adversely affect Verizon South[]" and dismissing Verizon South's petitions for review[25] — the Department should give no weight to the FCC's non-final determinations with respect to the Verizon South agreements.

Finally, although WorldCom and XO cite a number of cases in which federal courts upheld a state commission's conclusion that a particular interconnection agreement — in cases involving different parties and different agreements — required payment of reciprocal compensation for Internet-bound traffic, all those decisions were issued before the FCC, in *Starpower*, clarified the appropriate method of interpretation of such agreements (WorldCom

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22 FCC Motion to Dismiss, No. 02-1201, at 6; *see* FCC Motion to Dismiss, No. 02-1177, at 7.

23 FCC Reply on Its Motions To Dismiss, *Verizon South Inc. v. FCC*, Nos. 02-1201, 02-1311, *consolidated with* No. 02-1177, at 5 (D.C. Cir. filed Sept. 5, 2002).

24 *Id.* at 5-6.

25 Order, *Verizon South v. FCC*, Nos. 02-1201, 02-1311, *consolidated with* No. 02-1177, at 2 (D.C. Cir. Sept. 26, 2002).

Initial Brief at 16-17 (citing cases); XO Initial Brief at 8-10 (same)). The FCC's ruling, which was in the exercise of its statutory authority and which interpreted an agreement within its area of special competence, is entitled to the same deference accorded to its statutory interpretations. *See, e.g.*, *Western Res., Inc. v. FERC*, 9 F.3d 1568, 1576 (D.C. Cir. 1993); *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1568-72 (D.C. Cir. 1987); *see also Boston Edison Co. v. FERC*, 233 F.3d 60, 70 (1st Cir. 2000). As then-Judge Scalia explained, it would be "foolish not to accord great weight to the judgment" of an expert federal agency as to issues of contractual interpretation in the agency's field of expertise. *Kansas Cities v. FERC*, 723 F.2d 82, 87 (D.C. Cir. 1983).[26]

B. The FCC's Consistent Ruling That Internet-Bound Traffic Is Not Compensable Under § 251(b)(5) Remains Binding and Effective Today

As the FCC explained in *Starpower*, it "consistently has concluded that ISP-bound traffic does not fall within the scope of traffic under section 251(b)(5)." *Starpower* ¶ 31; *accord id.* ¶ 41; *see* Verizon MA Initial Brief at 22-23. The FCC reciprocal-compensation regulations currently in effect expressly state that no such compensation is required for Internet-bound traffic. *See* 47 C.F.R. §§ 51.701(b)(1), 51.703(a). Although the D.C. Circuit remanded the *ISP Remand Order* for further proceedings, it explicitly "d[id] not vacate the order"; and it reaffirmed that decision in denying CLECs' petitions for reconsideration. *WorldCom*, 288 F.3d at 434; *see, e.g.*, Order, *WorldCom, Inc. v. FCC*, No. 01-1218 (D.C. Cir. Sept. 25, 2002). The D.C. Circuit's refusal to vacate the *ISP Remand Order* means that the order — including its holding that Internet-bound traffic is not subject to the reciprocal-compensation requirement in

26 In light of the FCC's interpretation of the Starpower agreements, it is clear that XO is wrong when it claims that "it is improper to determine [the parties'] contractual rights by reference to FCC rulings" (XO Initial Brief at 4). Moreover, as noted above, the District Court and Magistrate Judge explicitly "t[ook] no position" on the question whether the agreements at issue, interpreted consistent with state law, define the parties' reciprocal-compensation obligations by reference to the requirements of federal law. F&R at 26 n.19.

§ 251(b)(5) and its regulations implementing that holding — is still valid and legally binding. *See, e.g.*, *National Lime Ass'n v. EPA*, 233 F.3d 625, 635 (D.C. Cir. 2000) (regulations that are remanded but not vacated are "le[ft] . . . in place during remand"); *Sierra Club v. EPA*, 167 F.3d 658, 664 (D.C. Cir. 1999) (same). The FCC has since confirmed that its reciprocal-compensation rules "remain in effect." Memorandum Opinion and Order, *Joint Application by BellSouth Corp., et al., for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, 17 FCC Rcd 9018, 9173, ¶ 272 (2002). Those regulations are not subject to collateral attack in a case brought under § 252, as WorldCom itself has repeatedly recognized in filings before federal courts. *See GTE South, Inc. v. Morrison*, 199 F.3d 733, 742-43 (4th Cir. 1999); *U S West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1123 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 2741 (2000).

The CLECs' claims to the contrary are without merit. WorldCom, for example, wrongly and inexplicably asserts that the rules adopted in the *ISP Remand Order* are "no longer good law," thus ignoring the D.C. Circuit's express refusal to vacate those rules (WorldCom Initial Brief at 28-29). Nor is GNAPs correct in contending that the FCC held only that Internet-bound traffic is jurisdictionally a single call, but left open the possibility that such traffic is functionally two separate services for purposes of reciprocal compensation (GNAPs Initial Brief at 25 n.53). In separate sections of the *ISP Remand Order*, the FCC reconfirmed its long-standing conclusions that Internet-bound traffic: (a) is jurisdictionally interstate on an end-to-end basis, *see ISP Remand Order* ¶¶ 52-65, and (b) is functionally a single call "that travel[s] to points — both interstate and intrastate — beyond the local exchange" for which payment of reciprocal compensation is not required, *id.* ¶ 37; *see id.* ¶ 44 n.82.[27]

[27] NCI Telecom — which appears from its comments to be a "CLEC [that] was established solely (or predominantly) for the purpose of funneling traffic to an ISP . . . that . . . is an affiliate," October 1998

Indeed, the *ISP Remand Order* follows a line of FCC precedent, dating back as early as 1983, that holds that traffic sent to ISPs and other enhanced service providers ("ESPs") does not terminate at the ESP's premises, but instead continues to the ultimate end-point of the communication (Verizon MA Initial Brief at 23). Based on this line of precedent, AT&T observed in 1997 that "[n]o commenter disputes that the vast majority of enhanced communications provided by ESPs is *interstate*, the *most prevalent use being Internet communications*."[28] In light of the FCC's consistent conclusion, WorldCom's and GNAPs' claim that, under the regulations the FCC promulgated in 1996, Internet-bound traffic actually terminates at the ISP's server cannot be accepted (WorldCom Initial Brief at 28; GNAPs Initial Brief at 14 n.23). As the FCC has recognized, the Internet, not the ISP, is the called party and, thus, Internet-bound traffic does not terminate at the ISP's server. *See ISP Remand Order* ¶ 59 ("ISPs . . . permit the dial-up Internet user to communicate directly with some distant site or party (*other than the ISP*) that the caller has specified.") (emphasis added); 47 C.F.R. § 51.701(d) (1996) (defining termination as the "delivery of such traffic *to the called party's premises*") (emphasis added).[29]

Order at 13; *see* NCI Initial Comments (describing itself as a CLEC/ISP) — suggests that Internet-bound traffic is functionally similar to a call to a voice mail system, both of which involve two calls (NCI Initial Comments). The FCC, however, has held that, like Internet-bound traffic, a call to a voice mail system is a "single, integral 'call' . . . stretching from the originating caller to the voice mail facility," with the "intermediate arrival and routing" of the call "at the subscriber's serving central office" irrelevant to the question whether payment of intercarrier compensation is required for such calls. Memorandum Opinion and Order on Reconsideration, *AT&T Corp. v. Bell Atlantic-Pennsylvania*, 15 FCC Rcd 7467, 7473, ¶ 13 (2000).

28 Reply Comments of AT&T, *Usage of the Public Switched Network by Information Service Providers*, CC Docket No. 96-263, *et al*., at 17 (FCC filed Apr. 23, 1997) (emphasis added); *see also* Joint Reply Comments of Bell Atlantic and NYNEX on Notice of Inquiry, *Usage of the Public Switched Network by Information Service and Internet Access Providers*, CC Docket No. 96-263, *et al*., at 9-10 (FCC filed Apr. 23, 1997) ("The simple fact is that Internet traffic is inherently interstate, interexchange traffic, not local traffic. . . . ISPs purchase access to the Internet from facilities-based Internet carriers and use the local network to transmit end user communications through the Internet to locations throughout the world.").

29 WorldCom claims that the Fifth Circuit held that, "under the FCC's regulations" a call terminates at the ISP's premises (WorldCom Initial Brief at 28 (citing *Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas*, 208 F.3d 475, 486 (5th Cir. 2000))). In fact, the Fifth Circuit held that, because the agreements at

For these reasons, the CLECs' claims that the Department cannot consider FCC rulings issued after the interconnection agreements at issue were signed are both wrong and, ultimately, irrelevant (*see, e.g.*, RNK Initial Brief at 5). As explained above, the Department should find — both in light of agreements' definition of reciprocal compensation to mean as "required by the Act and as *from time to time interpreted*" by the FCC and Department, and consistent with the FCC's interpretation of the Starpower agreements — that the parties agreed to "track the Commission's interpretation of the scope of section 251(b)(5)," so that "whatever the Commission determines is compensable under section 251(b)(5)" on an ongoing basis "will be what is compensable under the agreements." *Starpower* ¶ 31. But if the Department were to limit its consideration to the regulations promulgated and orders released prior to the time the agreements were signed, it must still find that the parties agreed not to pay reciprocal compensation for Internet-bound traffic because, under FCC decisions dating back to 1983, such traffic does not terminate locally.

C. Because the Plain Language of the Agreement Controls, There Is No Need for the Department To Consider CLECs' Reliance on Other Factors

In *Starpower*, the FCC held that, where the terms of an interconnection agreement unambiguously do not require reciprocal compensation for Internet-bound traffic, that is the end of the inquiry. Accordingly, the FCC rejected Starpower's reliance on the regulatory or negotiating context at the time the parties entered into the agreements, and on the various factors that the FCC enumerated in its *ISP Declaratory Ruling* for consideration in construing the terms

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issue there "provide[d] that undefined terms . . . are to be 'construed in accordance with their end user usage in the telecommunications industry as of the effective date of [these] Agreement[s],' the relevant question was "what[] the telecommunications industry took ['terminate'] to mean." *Southwestern Bell*, 208 F.3d at 486. The court concluded, incorrectly in Verizon MA's view and in a decision issued before *Starpower*, that under industry usage — not the FCC's regulations — Internet-bound traffic terminated at the ISP's premises. *See id.* In any event, these agreements define local traffic by tracking the then-existing FCC regulations, which the FCC has repeatedly held do not require reciprocal compensation for Internet-bound traffic.

of ambiguous agreements. *See Starpower* ¶¶ 33-38. The Department should similarly refuse to consider such arguments because the same plain meaning rule that the FCC applied in *Starpower* is applicable under Massachusetts law.

In fact, the CLECs here raise the exact same arguments that Starpower raised, and that the FCC rejected. XO and RNK note that the agreements at issue do not include an express exemption for Internet-bound traffic (XO Initial Brief at 8; RNK Initial Brief at 6 n.13). Yet the FCC found that it could not "conclude that the absence of certain contractual language has more persuasive force than the existence of other language addressing the precise question at hand" — namely, language tracking the FCC's reciprocal-compensation regulations. *See Starpower* ¶ 34. GNAPs relies on the FCC's "longstanding policy of treating [Internet-bound] traffic as local" (GNAPs Initial Brief at 17 (internal quotation marks omitted)). But the FCC explained that its "regulatory treatment of ISP-bound traffic as local *for certain purposes* only makes it *possible* that parties agreed in interconnection agreements to include such traffic within the ambit of calls eligible for reciprocal compensation. It does not mean that the parties *inevitably* did so." *Starpower* ¶ 36 (first emphasis added). Again, because the parties "track[ed] the [FCC's] construction of section 251(b)(5)," the FCC found that this regulatory context could not overcome the parties' "unambiguous[] agree[ment] *not* to treat ISP-bound traffic as 'Local Traffic' for reciprocal compensation purposes." *Id.* The same holds true here.

XO and GNAPs also argue that the Department should base its decision on the factors the FCC listed in its *ISP Declaratory Ruling* (XO Initial Brief at 8; GNAPs Initial Brief at 17-19). But the FCC held in *Starpower*, and WorldCom recognizes, that those factors simply do not apply when an agreement is unambiguous. *See Starpower* ¶¶ 34, 38 & n.122; WorldCom Initial

Brief at 26.[30] Moreover, the FCC has since disavowed the last of these factors — whether "CLECs would be compensated for this traffic" if Internet-bound traffic is not subject to reciprocal compensation[31] — finding in the *ISP Remand Order* that "the fundamental problem with application of reciprocal compensation to ISP-bound traffic is that the intercarrier payments fail altogether to account for a carrier's opportunity to recover costs from its ISP customers." *ISP Remand Order* ¶ 76. In other words, even if Internet-bound traffic is not treated as though it were local, CLECs can still obtain compensation for that traffic from their ISP customers, just as ILECs must do. *See id.* ¶ 83.

The FCC did not, as WorldCom claims, "conclude[] that a form of intercarrier compensation is necessary" for Internet-bound traffic so that CLECs can recover the costs they incur (WorldCom Initial Brief at 6). Instead, the FCC held that CLECs should be required to recover any such costs from their ISP customers and explicitly affirmed state commission decisions that did "not require[] payment of compensation for this traffic." *ISP Remand Order* ¶¶ 74, 80. The FCC also endorsed the Department's conclusion, in its May 1999 Order, that allowing CLECs to recover these costs through intercarrier compensation "is really just an unintended arbitrage opportunity" that "enriches competitive local exchange carriers, Internet service providers, and Internet users at the expense of telephone customers or shareholders." May 1999 Order at 32; *ISP Remand Order* ¶¶ 21, 29 (state-commission decisions requiring

30 In any event, many of the factors the FCC listed simply reflect Verizon MA's compliance with the positive requirements of federal law, which obligate Verizon MA to serve ISPs out of intrastate tariffs, to count revenues from those services as intrastate revenues, and to include calls to ISPs in local telephone charges. *See ISP Declaratory Ruling* ¶ 24. Because those factors generally reflect nothing more than the positive requirements of federal law, they reveal only that Verizon MA complies with federal law and, therefore, provide no basis for concluding that Verizon MA ever intended to treat Internet-bound traffic as though it were local for purposes of reciprocal compensation.

31 *Id.*

payment of reciprocal compensation for Internet-bound traffic under § 251(b)(5) had "distort[ed] the development of competitive markets" and had led to "classic regulatory arbitrage").

IV. EVEN IF THE AGREEMENTS WERE AMBIGUOUS, THE DEPARTMENT SHOULD RESOLVE THIS QUESTION ON THE BRIEFS AND SHOULD NOT PERMIT DISCOVERY OR CONDUCT AN EVIDENTIARY HEARING

WorldCom, GNAPs, and RNK argue that, if the Department determines that the agreements at issue are ambiguous, then it should allow the CLECs "to take discovery and present evidence regarding the parties' intent" (WorldCom Initial Brief at 24-26; *see* GNAPs Initial Brief at 26-28; RNK Initial Brief at 8-11). As these CLECs correctly recognize, under Massachusetts law, there is no reason for the Department to consider such evidence with respect to an unambiguous agreement, which is the case with the agreements at issue.

But even if the agreements were ambiguous with respect to the scope of the parties' reciprocal-compensation obligations, it is far too late for the CLECs to offer evidence of the parties' intent at the time they signed the agreements at issue. This is particularly true with respect to WorldCom, which "voluntarily relinquished [its] right to an evidentiary hearing" with respect to the proper interpretation of its agreement with Verizon MA. Order, D.T.E. 97-116-D, at 18 n.12 (Feb. 25, 2000). As a result, the Department issued its October 1998 Order based solely on the briefs and argument of the parties. Because all the evidence that WorldCom claims it would offer now could have been presented to the Department in 1998, it should be bound by its earlier decision not to present that evidence to the Department before it issued its initial order in D.T.E. 97-116.

Moreover, in its May 1999 Order, the Department offered WorldCom, GNAPs, and other CLECs the opportunity to initiate a complaint proceeding based "upon some claim that Massachusetts contract law or other legal or equitable considerations give rise to [a] mutual obligation . . . to pay reciprocal compensation for ISP-bound traffic."[32] In the August 2001 Order, the Department stated that its "offer to further address this issue . . . still stands," assuming that a CLEC could present an argument "based on something other than the definition of local traffic contained in these agreements."[33] No CLEC has ever taken the Department up on this offer, or even indicated that it possessed evidence that could support such a claim.

Yet now, for the first time in the nearly four-and-a-half years since the Department opened Docket D.T.E. 97-116, WorldCom and GNAPs claim that they can present evidence that Verizon MA verbally agreed to pay reciprocal compensation for Internet-bound traffic (WorldCom Initial Brief at 27; GNAPs Initial Brief at 27). The lateness of these claims is reason enough to dismiss this purported evidence — and Verizon MA disputes their claims. Moreover, WorldCom provides no specifics about when, where, or with whom this purported discussion occurred. Although GNAPs provides such detail, it appears to describe a conversation between Verizon New York and an ISP called WorldNET that was considering becoming a CLEC. Even if such a discussion occurred, it would shed no light on the intent of Verizon MA and GNAPs when they signed their interconnection agreement — GNAPs itself argued to the D.C. Circuit that "the carriers made no attempt to resolve th[e] ambiguity" with respect to whether the agreement requires reciprocal compensation for Internet-bound traffic.[34] In fact, there is tangible evidence of discussions between Verizon MA and GNAPs, which demonstrates that Verizon MA clearly informed GNAPs of its position that Internet-bound traffic is "not subject to reciprocal

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32 May 1999 Order at 27.

33 Order at 16-17, D.T.E. 97-116-F (Aug. 29, 2001) ("August 2001 Order").

34 *Global NAPS, Inc. v. FCC*, 291 F.3d 832, 834 (D.C. Cir. 2002).

compensation for the termination of local traffic as provided in the intereconnection agreement."[35]

However, even if the Department were to accept the undocumented "offer of proof" proffered by GNAPs as true (GNAPs Initial Brief at 26-27), it would provide no basis to conclude that the interconnection agreement provided for reciprocal-compensation payments for Internet-bound traffic. Under Massachusetts contract law, "parties are bound by the plain terms of the contract," *Hiller v. Submarine Signal Co.*, 91 N.E.2d 667, 669 (Mass. 1950), and their subjective expectations are immaterial where those terms are unambiguous, *see Blakeley v. Pilgrim Packing Co.*, 340 N.E.2d 511, 514 (Mass. App. Ct. 1976).

35 Letter from Bruce P. Beausejour, NYNEX, to William J. Rooney, GNAPs, at 1 (Apr. 14, 1997).

V. CONCLUSION

The Department should find that, in accordance with state contract law, under the plain terms of both the Verizon MA–WorldCom Agreement and the Verizon MA–GNAPs Agreement, the parties are not required to pay reciprocal compensation for Internet-bound traffic, because the parties agreed to pay reciprocal compensation only to the extent required by federal law, and federal law does not require payment of such compensation.

Respectfully submitted,

VERIZON NEW ENGLAND INC. D/B/A
VERIZON MASSACHUSETTS

By its attorneys,

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Bruce P. Beausejour
Vice President and General Counsel
Verizon New England Inc.
185 Franklin Street, 13th Floor
Boston, Massachusetts 02110-1585
(617) 743-2445

____

Robert N. Werlin
Keegan, Werlin & Pabian, LLP
21 Custom House Street
Boston, Massachusetts 02110
(617) 951-1400

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